Protected States: The Political Status of the Federated States of Micronesia and the Republic of the Marshall Islands

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On 24 April 1991 the US Foreign Broadcast Information Service reported that Germany had decided to recognize the Federated States of Micronesia (FSM) and the Republic of the Marshall Islands (RMI), two western Pacific island nations freely associated with the United States (FBIS 1991). Germany, the colonial master of both territories between 1899 and 1914, made symbolic amends by becoming the first European state to proclaim its intention to establish diplomatic relations with both nations. Well before the German move, however, four foreign embassies had been established in the Federated States and one in the Marshall Islands. Both nations were admitted to the United Nations in September 1991. Stewart Firth's argument that neither is sovereign (Firth 1989, 75) can no longer be sustained. A theory that accounts adequately for international recognition of the two countries is needed.

The German breakthrough was by no means the principal milestone in the two nations' campaigns to expand their presence in the international community. That distinction belongs to the late 1986 joint declarations between the United States and both states that the United Nations trusteeship agreement establishing the US-administered Trust Territory of the Pacific Islands was no longer applicable. The declarations concurrently implemented the Compact of Free Association, a bilateral agreement mutually binding the two nations and the United States. On 22 December 1990, the UN Security Council passed Resolution 683 (UNSC 1990), terminating the trusteeship with respect to the Federated States of Micronesia and the Republic of the Marshall Islands. Resolution 683 set the stage for their admission to the United Nations.

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Diplomatic efforts of both nations nonetheless enjoyed significant success prior to Resolution 683. Between 21 October 1986—the date of compact implementation for the Marshall Islands—and 22 December 1990, the Federated States and the Marshalls established diplomatic relations with each other and with such diverse nations as the United States, Japan, Australia, New Zealand, Chile, the Philippines, Israel, the People's Republic of China, and numerous South Pacific states (Zdanovich 1991, 4). They also were admitted to the International Civil Aviation Organization, the South Pacific Forum, and the Asian Development Bank. Finally, Australia, the Philippines, and China established embassies in the Federated States, joining US embassies in both nations.

It is tempting to ascribe these achievements to a dawning international acknowledgment of the right to self-determination of the peoples of these parts of Micronesia. The 14 to 1 Security Council vote to terminate the US trusteeship over the Northern Mariana Islands, the Federated States of Micronesia, and the Republic of the Marshall Islands (ie, on Res 683) illustrated overwhelming international support for their self-determination. And the statements welcoming the council's action, notably by the People's Republic of China, the United Kingdom, and the former Soviet Union, emphasized that the people of both nations and the Northern Marianas had engaged in valid acts of self-determination (UNSC 1990).

This emphasis on self-determination, however, begged the question of why so many nations had already recognized the two freely associated states. Engaging in an act of self-determination does not inevitably lead to sovereignty, as the case of the Northern Marianas, now a US commonwealth, demonstrates. Numerous peoples and territories claiming the right to self-determination have failed to attain international recognition. The freely associated states would not have made such gains prior to the UN Security Council trusteeship termination had there not been compelling reason for other states to accept their international personalities.

This article explains why the Micronesian quest for international recognition was successful. It discusses the origin of the concept of free association; the Compact of Free Association; theories rejecting freely associated state sovereignty; Micronesian sovereignty; Micronesian independence; and the international relations of both nations. It concludes that the term *free association* no longer accurately describes the relationships of the Federated States of Micronesia and the Republic of the Marshall Islands with the United States.

The author argues instead, drawing upon Alan James's *Sovereign Statehood* (1986), that the implementation of the compact revived the all-but-forgotten status of "protected states," that is, sovereign nations that have delegated part of their inherent powers to another nation. Furthermore, the protected states known as the Federated States of Micronesia and the Republic of the Marshall Islands are not only sovereign but independent, despite the seeming limitations of the compact and its subsidiary agreements.

Free Association

Free association as a political status originated in a series of efforts by the United Nations to encourage the transition of non-self-governing territories to self-governing status. These efforts took on special importance following World War II, when it was by no means clear that the victorious European colonial powers would willingly relinquish their overseas possessions. In 1953, the UN General Assembly passed Resolution 742 (VIII) to clarify when article 73 of the UN Charter no longer required a colonial power to report on non-self-governing territories. An annex listed the "Factors Indicative of the Attainment of Independence or of other Separate Systems of Self-Government" and identified three principal status options: independence, what has come to be known as free association, and integration into a metropolitan state.

That same day the UN General Assembly passed Resolution 748 (VIII) recognizing "the association of the Commonwealth of Puerto Rico with the United States of America has been established as a mutually agreed association." Puerto Rico did not fit neatly into any of the three categories established by Resolution 742, as pointed out by Clark. Resolution 748 nonetheless approved an end to US reporting on Puerto Rico under Article 73. The resolution was the first to recognize "association" as a status (Clark 1980, 41–46).

General Assembly Resolution 1514 (XV), known as the "Declaration on the Granting of Independence to Colonial Countries and Peoples" (the Declaration) and adopted on 14 December 1960, emphasized the desirability of non-self-governing states becoming independent, as opposed to attaining other possible statuses. As one observer noted, however, "The Declaration can be read as permitting nothing short of independence and is often so read by states which ignore a somewhat milder resolution

adopted the following day, Resolution 1541" (Clark 1980, 50). This companion measure reaffirmed the acceptability of alternatives other than independence. General Assembly Resolution 1541 (XV) made a renewed effort to clarify when Article 73 reporting on non-self-governing territories could be discontinued. It defined the option of free association in far greater detail than did Resolution 742. The US government maintains that Resolutions 1514 and 1541 must be read as a single document (UNGA 1989, 8), demonstrating the importance the United States attaches to the latter's moderating influence on appeals to Resolution 1514.

The first two entities to become associated states under Resolution 1541 were the Cook Islands and Niue, until then non-self-governing South Pacific island territories of New Zealand. The Cook Islands became freely associated with New Zealand in 1965, on passage by its Legislative Assembly of a resolution requesting "New Zealand in consultation with the Cook Islands to discharge the responsibilities for the external affairs and defence of the Cook Islands."

The New Zealand Parliament and the Cook Islands Parliament had previously passed the Cook Islands Constitution Act of 1964, containing the Cook Islands Constitution. According to Section 5 of the act, "Nothing in this Act or in the Constitution shall affect the responsibilities of Her Majesty the Queen in right of New Zealand for the external affairs and defence of the Cook Islands, those responsibilities to be discharged after consultation by the Prime Minister of New Zealand with the Premier of the Cook Islands." The UN General Assembly approved free association for the Cook Islands in 1965 under Resolution 2064 (XX). Niue voters also backed free association with New Zealand in a 1974 UN-observed referendum. The General Assembly accepted the Niue results by passing Resolution 3285 (XXIX) (Clark 1980, 54–60).

The Cook Islands subsequently modified its constitution to assist in the development of external relations (Aikman 1982, 89–91). New Zealand itself has taken the position that "the exercise by the New Zealand Government of any responsibilities in foreign affairs or defence must be preceded by full consultation with the Cook Islands" (Aikman 1982, 93), in an effort to facilitate recognition of the international personality of the Cook Islands.[1]

The United Kingdom, in contrast to the skillful New Zealand diplomacy at the United Nations, bungled a 1967 bid to decolonize several Caribbean territories. The General Assembly voted overwhelmingly (86 to

0 with 27 abstentions) to refuse to terminate Article 73 reporting requirements for the United Kingdom with respect to five associated states established under the West Indies Act of 1967. The General Assembly, however, rejected the British failure to consult the United Nations in the decolonization process (Clark 1980, 60–64), rather than the status of association itself.

In 1970, the General Assembly, via Resolution 2625 (XXV), "The Declaration of Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations," once again approved free association as a means of achieving self-governing status. It went even further by including "the emergence into any other political status freely determined by a people" as an outcome as acceptable as independence, integration, or free association (Leibowitz 1989, 507). This resolution in effect left it up to member states to decide how to deal with emerging political entities.

How to handle associated states nonetheless continued to perplex sovereign nations, multilateral organizations, and scholars. James Crawford, author of a comprehensive examination of statehood and sovereignty, observed, "It cannot simply be asserted that Associated States lack all international status. They are clearly not separate independent States, but equally they are not for international purposes merely part of the metropolitan State." Crawford ultimately hedged that "the Associated State will acquire substantial international personality" (Crawford 1979, 376–377).

The Cook Islands and Niue indeed have made significant progress in establishing multilateral personalities, but their bilateral personalities are far more restricted. Both are members of the South Pacific Forum (the Cook Islands was a founding member in 1971) and the South Pacific Commission. Although neither has been admitted to the United Nations, both are associate members of the UN Economic and Social Commission for Asia and the Pacific (Jonassen 1983, Appendix B). The Cook Islands also has joined such specialized UN agencies as the World Health Organization (USDS 1991, 325), the International Civil Aviation Organization (USDS 1991, 330), UNESCO, and the Food and Agriculture Organization (USDS 1991, 317). On the other hand, the European Community rejected a Cook Islands bid to accede to the Lomé Convention between the European Community and Asia-Caribbean-Pacific states (Aikman 1982, 93–94), a decision yet to be reversed.

The Cook Islands and Niue have established bilateral ties with a num-

ber of nations, primarily in the Pacific. The Cook Islands also has signed several agreements with the United States (USDS 1991, 50–51). Nonetheless, as of early 1992 there were no foreign diplomatic missions in the Cook Islands capital, Rarotonga, and only one consular office. Further advances in bilateral diplomacy are hindered by several factors: the retention of New Zealand citizenship in lieu of establishing separate Cook Islands or Niue citizenships (Aikman 1982, 88; Clark 1980, 55); the statutory vesting of the foreign affairs power in New Zealand; and the small population, remoteness, and relative economic insignificance of both states.

The Compact of Free Association

The experience of the United States in negotiating free association with its only UN trust territory was bound to differ from the experiences of either New Zealand or the United Kingdom. The United States perceived Micronesia to be far more important to it strategically than the tiny dependencies of New Zealand and the United Kingdom ever were to those countries. The US military wrested the Micronesian islands from Japan in World War II in a series of bloody battles that stiffened American resolve never again to permit them to be used against US forces. The United States drafted and subsequently ratified a UN trusteeship agreement (UNSC 1947) giving itself virtual carte blanche in military affairs. In bringing the Trust Territory of the Pacific Islands into existence in July 1947, however, that agreement also foreclosed any US claim to sovereignty over Micronesia, (Sayre 1948, 271), except for the restored US Territory of Guam. This renunciation laid the foundation for the emergence of Micronesian sovereignty and independence.

Among the eleven post–World War II trusteeships established by the United Nations, only the Trust Territory of the Pacific Islands was designated a strategic trusteeship. The trusteeship agreement permitted the United States to station military forces and construct fortifications within the trust territory, as well as to restrict or deny access to it for security reasons. It also allowed the United States to continue testing atomic weapons. The testing had already begun in July 1946 with a series of nuclear explosions at Bikini Atoll, reflecting US unwillingness to delay the achievement of vital national goals pending entry into force of the trusteeship. The United States cemented control over the Trust Territory by

ensuring that all strategic trusteeship issues were handled by either the Security Council or the UN Trusteeship Council. The United States has a veto in the former, and, together with France and the United Kingdom, controlled the latter.

Negotiations over a post-trusteeship relationship between the United States and the Trust Territory began in 1969, over twenty years later. The Trust Territory then embraced six districts: Palau, Yap, the Northern Marianas, Truk, Ponape, and the Marshalls. From the start the Northern Marianas had favored a closer relationship with the United States than the other districts. Aspirations in the Northern Marianas for political integration with the United States culminated in 1975 in the "Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America" (US Statutes at Large 90, 263). The covenant took effect, except for the Northern Marianas' incorporation into the United States, on 9 January 1978.

The remaining portions of the Trust Territory followed a very different path. Kusaie (now Kosrae) Island, formerly part of Ponape (now Pohnpei) District, became a separate district on 1 January 1977. Palau and the Marshall Islands entered into separate political status negotiations with the United States after failing in 1978 to ratify a constitution drafted by delegates from all districts of the trust territory. Yap, Truk (now Chuuk), Ponape, and Kusaie districts ratified the constitution, thereby uniting into the present Federated States of Micronesia. Palau and the Marshall Islands gained their own governments after ratifying constitutions in separate plebiscites.

After over a decade of negotiations, US, FSM, and RMI officials initialed a draft Compact of Free Association in 1980 (Leibowitz 1989, 646). The Federated States of Micronesia and the United States signed the compact and a host of subsidiary agreements in 1982. The Marshall Islands followed suit in 1983. FSM and Marshall Islands voters approved the compact in separate UN-observed plebiscites in 1983. Somewhat confusingly, the same compact applied to both countries, although the accompanying bilateral subsidiary agreements were individually tailored.

Following US congressional approval of the compact, President Reagan proclaimed the trusteeship no longer applied to the Federated States as of 3 November 1986, or to the Marshall Islands as of 21 October 1986. The FSM and RMI governments issued their own declarations of nonapplica-

bility (see NU, 28 Feb 1987, 4, for the FSM proclamation). President Reagan's proclamation also incorporated the Northern Marianas into the United States as of 12:01 AM on 4 November 1986. The joint declarations of nonapplicability by the United States, the Federated States, and the Marshall Islands, in contrast, implemented the Compact of Free Association.

The declarations of nonapplicability were controversial because the United States did not seek UN Security Council approval. Article 83 of the UN Charter empowered the council to exercise "All functions of the United Nations relating to strategic areas, including the approval of the terms of the trusteeship agreements and of their alteration or amendment . . ." The US government instead addressed the issue in the Trusteeship Council, an organ of the UN General Assembly. The Trusteeship Council approved the US move in advance by passing Resolution 2183 (LIII) on 28 May 1986. The United States assured the council that it did not consider its action a unilateral termination. According to a US official who served from 1987 to 1990 with the US delegation to Trusteeship Council meetings, where the United States reported on social and economic progress in the Trust Territory of the Pacific Islands:

> It was our [the US] contention that [the declaration] fell within the prerogatives of the administering authority to administer the territory any way it saw fit including the granting of full self-government under the status agreements without actual termination of the Trusteeship Agreement by the Security Council. . . . [W]e took the position that since there was no termination procedure established for the strategic trust, and our obligation was to promote self government etc (art. 76 [of the UN Charter]) we were simply honoring our trust responsibilities by granting full self government and lifting the application of the Trusteeship Agreement as appropriate to the governments concerned. (McPhetres 1991)

The compact departs from the form of free association pioneered by the Cook Islands and Niue by reserving foreign affairs to the FSM and RMI governments. It follows those precedents by vesting defense authority in their partner, that is, the United States. Section 311 of Title Three—Security and Defense Relations—of the compact obliges the US government to defend the Federated States and the Marshall Islands as if they were part of the United States. Section 311 also empowers the United States to deny

access to or the use by third-nation military forces of FSM and RMI facilities and gives the United States the option to establish and use military facilities in both nations (US 1987*a*, 99 Stat 1822).

These responsibilities and privileges are reconciled with the foreign affairs capacities of both nations by Section 123 of Title One—Governmental Relations: "In recognition of the authority and responsibility of the Government of the United States under Title Three, the Governments of the Marshall Islands and the Federated States of Micronesia shall consult, in the conduct of their foreign affairs, with the Government of the United States" (US 1987*a*, 99 Stat 1802). Contrary to Gary Smith's sweeping assertion that "the Micronesian governments are required to 'consult' with the US government in the general conduct of their foreign affairs" (Smith 1991, 97), this obliges the freely associated states to consult on foreign affairs only in the context of security and defense matters. The compact, including sections 311 and 123, can be terminated unilaterally or by mutual agreement under sections 441, 442, or 443 of Title Four (US 1987*a*, 99 Stat 1829).

Those who question FSM and RMI sovereignty tend to focus not on the compact itself, but on the subsidiary mutual security agreements with the United States. The mutual security agreement between the Federated States of Micronesia and the United States ("Agreement Between The Government of the United States and The Government of the Federated States of Micronesia Regarding Friendship, Cooperation and Mutual Security Concluded Pursuant to Sections 321 and 323 of The Compact of Free Association" [US 1987*a*]) provides for mutual consultation in the event of a threat to the political independence of the signatory governments or to their mutual security in the Pacific. It also contains a direct US security commitment to the Federated States.

For its part, the Federated States of Micronesia pledges to consult before permitting any third country access to or use of its facilities by military personnel or for military purposes. The Federated States agrees that the US government has the authority and responsibility to foreclose such access or use based upon its sole determination, unless both governments agree on such access or use. The Republic of the Marshall Islands and the United States concluded a similar subsidiary agreement ("Agreement Between the Government of the United States and The Government of the Marshall Islands Regarding Mutual Security Concluded Pursuant to Sec-

tions 321 and 323 of The Compact of Free Association" [US 1987*b*]). Unlike the compact, these agreements can be terminated only by mutual agreement.

Theories Discounting FSM and RMI Sovereignty

The existence of continued formal ties between associated states and their partners has led some scholars to question whether such states can be considered sovereign. Alan James, for example, asserts that if a supposedly sovereign entity's constitution can be altered unilaterally by an outside state, the former cannot be considered sovereign. He views sovereignty not as a "bundle of attributes," admitting of degrees, but rather as an either-or proposition that turns on the presence or absence of constitutional independence.

James denies that associated states, even those responsible for their external affairs, are sovereign entities. He argues that the agreements of association can be terminated unilaterally by either side, "which means that the constitution of the associated state can be altered in a fundamental way by an outsider." James also claims associated states are not sovereign because they were in "colonial subordination" prior to the agreement of association (James 1986, 105).

Stewart Firth cites James in arguing that the mutual security subsidiary agreements between the United States and the Federated States of Micronesia and the Republic of the Marshall Islands "create a right of permanent strategic denial in the area by the United States armed forces. . . . The effect of the subsidiary agreements is that the Marshalls and the Federated States may withdraw from the benefits but not from the costs and obligations created by their political settlement with the United States." According to Firth, "The Marshall Islands cannot terminate the application of strategic denial by a constitutional amendment. In this sense I assert the existence of a constitutional link between the United States and Micronesia"—presumably both the Federated States and the Marshall Islands (Firth 1989, 79).

Firth further argues that the joint declarations of nonapplicability of the trusteeship improperly circumvented the required Security Council approval (1989, 80–81). Ironically, the Security Council, originally viewed as the only sure means of protecting US interests in the trusteeship, became an obstacle when the United States sought to help the Micronesian states

obtain international recognition. The United States refrained from proposing a Security Council resolution terminating the trusteeship because the Soviet Union had indicated it would veto such an effort. This would have had the disastrous effect, for both states, of seeming to reject their claim to international standing.

The United States justified its failure to request Security Council approval for the declarations of nonapplicability by asserting that Article 83 does not specify how the strategic trusteeship would be terminated. The US reasoning was taken with a grain of salt by such West European allies as France and the United Kingdom, which declined to recognize either nation in the absence of Security Council action. Firth claimed that the standoff over the role of the Security Council left substantial doubt as to the sovereignty of the two countries (1989, 80–83).

Yash Ghai, a Pacific constitutional scholar, raised another objection. He argued: "The constitutions [of the former trust territory districts] did not require enactment by the US; on the other hand the [constitutional] conventions were themselves the creation of the Congress of Micronesia, which owed its existence to an Order of the United States. Thus the constitutions do not pass the purist's test of autochthony, even though the constitutions do not come into force unless approved in a referendum" (Ghai 1985, 32).

Arguments Supporting FSM and RMI Sovereignty

None of these reasons for refusing to concede the sovereignty of the Federated States of Micronesia and the Republic of the Marshall Islands is valid. It is therefore not surprising that the two countries won international recognition prior to the Security Council termination. James's insistence upon constitutional independence as the touchstone of sovereignty is not unreasonable; what is unreasonable is his presumption that the FSM and RMI constitutions are not independent of the United States. Neither was enacted by the United States Congress nor did the US government draft, adopt, or amend them. Termination of the compact or any of its subsidiary agreements would not alter either country's constitution, although it could have a major effect on their finances. There is simply no organic link between the constitutions of the two polities and the United States. Nor can the trusteeship under which the freely associated states were administered prior to compact implementation be equated to the

"colonial subordination" that encourages James to reject the sovereignty of associated states.

Firth's effort to posit a constitutional link based on the mutual security agreements also fails to stand up under scrutiny. He asserts that the Federated States and the Marshalls are constitutionally linked to the United States because they cannot terminate the mutual security subsidiary agreements by unilateral constitutional amendments. If that were the case, however, then all nations that have signed treaties with one another would be constitutionally linked. As James himself points out, treaties are properly subject to termination only by mutual agreement (James 1986, 104). The inability to terminate treaties unilaterally thereby would deprive all parties to such agreements of sovereignty—a *reductio ad absurdum* demonstrating the argument's fallacy.

To the contrary, the Federated States of Micronesia and the Republic of the Marshall Islands can unilaterally terminate or breach treaties they have signed, including the Compact of Free Association. The US Congress certainly foresaw this possibility. It tried to discourage such actions with respect to the compact by insisting upon the inclusion of clauses permitting the United States, in the event of FSM or RMI noncompliance, to suspend compact-mandated payments (US 1987*a*, 99 Stat 1793). Both nations have the underlying capacity to act unilaterally—even against their own best interests.

The most telling argument against the hypothesis that neither nation is sovereign, however, has been the willingness of other nations to enter into normal diplomatic relations with and establish embassies in both countries. Both nations successfully expanded their international personalities in both multilateral and bilateral spheres prior to the trusteeship termination. Their diplomatic relations are expanding inexorably in the post-trusteeship period. The theory that the mutual security agreements preclude FSM and RMI sovereignty must be discarded because it cannot explain these developments.

The debate over the role of the UN Security Council in terminating the trusteeship became irrelevant with the December 1990 termination. In its willingness to make the trusteeship nonapplicable prior to termination, the United States tapped a deep well of sentiment in favor of self-determination that turned the declarations of nonapplicability into a diplomatic success rather than a failure. The joint declarations—incorrectly labeled at times as the "unilateral US termination" because they were neither uni-

lateral nor a termination—advanced the cause of self-determination in the course of implementing a political status currently extant nowhere else on earth.

Yash Ghai slights the FSM and RMI constitutions because they were drafted by conventions convened by an institution—the Congress of Micronesia—established by the trusteeship administering power. This objection, however, could be directed with equal force at the constitutions of other Pacific states. For example, the Constituent Assembly of Papua New Guinea that enacted the PNG constitution prior to independence consisted of the members of the House of Assembly (Ghai 1985, 31) established by the Australian colonial administration. FSM and RMI sovereignty is less tainted by constitutions drafted under the auspices of UN trusteeship than the sovereignty of other nations is by constitutions drafted under the auspices of colonialism.

Micronesian Sovereignty

Since the principal objections to FSM and RMI sovereignty do not hold up, whence does Micronesian sovereignty spring? Did the United Nations —and prior to it, the League of Nations—exercise sovereignty, given that neither the United States, nor its administrative predecessor, Japan, ever asserted sovereignty over the Micronesian islands (Sayre 1948, 270–271; Hills 1984, 590)? Or has sovereignty always resided in the Micronesian people?

Referring to the pre–World War II League of Nations mandate system, which included Japanese-mandated Micronesia, Sayre observed in 1948 that "little now is heard of the theory that sovereignty over the mandated territories resided in the League of Nations." Sayre argued that the League of Nations disappeared without transferring mandate responsibilities or title to the mandated territories to the United Nations (Sayre 1948, 271).

The US government claimed in 1947 that the League of Nations' successor, the United Nations, could "properly represent that aspect [sovereignty] of the life of these islands" (McKibben 1990, 269, n63). This hypothesis is equally questionable. The United Nations did not assert sovereignty over the Micronesian islands in the trusteeship agreement with the United States. Instead, it enjoined the United States "to provide the status of citizenship of the trust territory for the inhabitants of the trust territory" (UNSC 1947, Article 11). This reflected UN intentions neither to

assert sovereignty—as it could have, for example, by creating a common UN citizenship for the inhabitants of all eleven post–World War II trusteeships—nor to permit administering powers to integrate their trust territories by conferring metropolitan citizenship. The trusteeships bestowed international approval only for the administering powers to act *as if* they were sovereign. Micronesian sovereignty therefore can be considered to have lain "dormant" (McKibben 1990, 268, n59) during the trusteeship.

The Federated States of Micronesia and the Republic of the Marshall Islands emerged from this dormant state when they gained the capacity to enter into binding international commitments prior to the joint declarations of nonapplicability of the trusteeship—specifically, when their constitutions entered into effect: 10 May 1979 in the Federated States (Burdick 1988, 257), and 1 May 1979 in the Marshalls (RMI 1988, 48). Burdick argues:

> Indeed, it is important that the [FSM] Constitution was designed to come into effect before the termination of the Trusteeship to ensure that the establishment of a new political relationship with a foreign power would be done under the authority of, and in conformity with, the Constitution. Thus, the Constitution's chronological precedence helps ensure its supremacy over international agreements.
>
> The referendum on the Constitution was therefore an act of self-determination of the most fundamental significance. For the first time in the modern era, Micronesians asserted the existence of their sovereignty and identified its locus. (Burdick 1988, 259)

To be sure, some Micronesians had previously denied that their sovereignty depended upon any external colonial or administering powers. For example, a group called Micronesian Independence Advocates—Hawaii declared "Before any whiteman set foot on our islands, we were independent and sovereign. . . . We declare that the sovereignty of Micronesia has always resided in the people of Micronesia and we want our American masters to acknowledge this non-negotiable and inalienable right" (MIAH 1971, 1).

Burdick nonetheless correctly asserts that only the entry into effect of the FSM and RMI constitutions created a locus for that sovereignty. The constitutions thereby invested the Federated States and the Marshall Islands with sufficient international personality to enter into binding agreements such as the compact. This analysis is congruent with that of

James. Sovereignty presupposes, according to James, a constitution, or some document serving as one, independent of organic links to another nation (James 1986, 105). This is the case with both of the constitutions of the freely associated states. The entry into force of the FSM and RMI constitutions therefore was the point at which the two nations emerged as sovereign entities, not the entry into force years later of the compact. The compact undoubtedly is the single most important international agreement those nations have ratified so far but, as former FSM President Haglelgam has pointed out:

> *The Compact of Free Association is not organic to Micronesian sovereignty.* It is not an instrument which transfers sovereignty to the Micronesian people. It is a treaty, entered into by two co-equal sovereigns, and made effective, not unilaterally, but by the constitutional processes of each. (Haglelgam 1990, 5–6, italics in original)

It does not detract from Haglelgam's point to note that the compact and its subsidiary agreements were not submitted in the form of a treaty to the US Senate for its advice and consent, as prescribed by the US Constitution. Both houses of Congress instead approved them as a "Congressional-Executive Agreement." The UN trusteeship agreement was approved in 1947 in the same manner (Hills 1984, 588). The US government considers a treaty and executive agreement to impose equivalent international obligations (USC 1984, 108).

Haglelgam also could have noted that the compact was the product of a series of arduous and intense negotiations. The Micronesian side struggled successfully to obtain US agreement, in Principle Three of the Hilo Principles—adopted in Hawai'i on 9 April 1978—that the proposed constitution would be the supreme law of the new nation, rather than the compact itself (Leibowitz 1989, 657–659). Similarly, the Micronesians gained US agreement to vest the foreign affairs authority in the nascent nation, rather than in the United States (Leibowitz 1989, 673–676). These struggles lay to rest the canard that free association is a unilaterally imposed, US government–dictated status.

The hypothesis that the Federated States and the Marshall Islands gained their sovereignty when their constitutions entered into force faces a more substantial challenge. The US Secretary of the Interior, prior to devolving power to the new constitutional governments, reserved the right to suspend laws, by implication including constitutional amendments,

enacted by their legislatures (USDOI 1979, 28117). At first, this move seems to have created, albeit indirectly, the "constitutional link" with the United States asserted by Firth.

The United States, however, did not reserve any authority to alter, suspend, repeal, or otherwise derogate the two constitutions. Moreover, both nations have always been able to amend their constitutions by means other than enacting laws (FSM 1982, C-16; RMI 1988, 43). The effect of the reservation on the "constitutional independence" considered by James to be at the heart of sovereignty therefore was only marginal. The reservation aimed not to cripple the fledgling governments, but rather to leave no doubt that the United States retained the authority to continue fulfilling its trusteeship obligations.

Micronesian Independence

In contrast to the eventual US acknowledgment of Micronesian sovereignty, the United States consistently has viewed Micronesian independence as a potential threat to its security interests. The initial US draft of the 1947 trusteeship agreement focused only on "self-government" as a goal for the development of the Trust Territory. Pressed by the Soviet delegation to amend that phrase to "self-government or independence" the US representative agreed, but declared "the United States feels that it must record its opposition not to the principle of independence, to which no people could be more consecrated than the people of the United States, but to the thought that it could possibly be achieved within any foreseeable future in this case" (Sayre 1948, 280–281; Clark 1980, 6–7).

This skepticism reappeared many years later in the US insistence that the Federated States and the Marshall Islands avoid any mention of, or even renounce, independence in documents defining their status in relation to the United States. For example, according to the second sentence of the first Hilo Principle, "During the life of the agreement [of free association] the political status of the peoples of Micronesia shall remain that of free association as distinguished from independence" (Manhard 1979, 73). The preamble to the compact itself (US 1987*a*, 99 Stat 1800) omits any mention of independence (referring only to "institutions of self-government"), as do the preambles to the FSM and RMI constitutions. The US government, in fact, agreed to negotiate an agreement of free association only after the Micronesians first rejected an offer to become part of the

United States. Free association must have seemed to offer the only alternative short of independence likely to gain international approval, despite Resolution 2625 (XXV).

US officials have referred occasionally but only half-heartedly to the Micronesian right to seek political independence (USC 1984, 48). President Reagan did not mention independence in his proclamation implementing the compact or in subsequent congratulatory anniversary messages to the Federated States of Micronesia. President Bush followed suit. The Department of State adheres to this policy, although not without internal debate.

In a rare deviation from this otherwise consistent US approach, the subsidiary mutual security agreements called for consultations in the event "the political independence of either of [the signatory governments] or their mutual security is threatened in the Pacific." US Permanent Representative to the United Nations Pickering came close to employing the "I-word" in a statement delivered before the Security Council just prior to its termination of the trusteeship. Ambassador Pickering declared, "I believe we should move as well to recognize the clear wishes of 140,000 inhabitants of the Marshalls and the Federated States of Micronesia, who themselves wish to have their status reviewed by the Council and seen to be effectively that of States in free association with the United States, with the capacity to act independently" (UNSC 1990, 7). The latter phrase could presage a fundamental shift in US terminology.

The United States' hesitation to employ the term *independence* in relation to the freely associated states exasperates the Micronesians, who have laid claim to independence since the beginning of free association. FSM President Nakayama, for example, proclaimed the compact implemented on behalf of the Federated States on 3 November 1986 with the words "we, the free and independent people of the Federated States of Micronesia . . . now enter into free and voluntary association with the United States of America in accordance with the Compact of Free Association" (NU, 28 Feb 1987, 4).

Given its cautious approach toward the status of the freely associated states, the United States originally expected neither entity to qualify for UN membership. The executive branch responded to a 1984 congressional inquiry by noting, "In the view of the United States, the Freely Associated States, while having sovereignty and full self-government, will not possess the attributes of independence called for in the eligibility criteria of the United Nations Charter" (USC 1984, 109). An executive branch official

predicted the plenary US authority for defense and security matters would deprive the two nations of the "attributes of statehood sufficient for admission to the U.N. under the criteria established in Article 4(1) of the Charter" (USC 1984, 50).

Notwithstanding this rather pessimistic assessment, the US government had already committed itself in Section 122 of the compact to support freely associated state membership in regional and international bodies—the latter presumably including the United Nations—but only "as may be mutually agreed." The United States indeed responded positively when the Federated States of Micronesia decided to seek UN membership following the Security Council trusteeship termination (Haglelgam 1991, 13). It could hardly have reacted otherwise, given its professed goal of promoting "international recognition of the Freely Associated States by all countries of the world, assisting them in overcoming barriers to their recognition erected by some countries in the U.N. context" (USDS 1990, 8). The United States therefore supported the FSM and RMI applications to become UN members that culminated in their September 1991 admission.

The United States, in contrast, has steadfastly resisted the FSM desire to sign the South Pacific Nuclear Free Zone (SPNFZ) Treaty. The Federated States indicated its support for the SPNFZ Treaty in 1985 (NU, 15 Aug 1985), the year members of the South Pacific Forum opened it for signature. The SPNFZ boundaries deliberately excluded Micronesia so as to maximize the chances of US ratification of the SPNFZ Treaty protocols. The treaty's Article XII, however, set out the procedures by which the SPNFZ can be expanded upon accession by Forum members north of the equator, clearly anticipating the inclusion of the Federated States and the Marshall Islands.

President Haglelgam indicated publicly that the Federated States of Micronesia was considering signing the SPNFZ Treaty in November 1989 (Mangnall 1989). Such a move, however, would require prior consultation with the United States under both the compact and the mutual security subsidiary agreement. The United States itself has declined to ratify the protocols attached to the SPNFZ Treaty. As long as the United States maintains this attitude, it is unlikely to agree to FSM or RMI accession to the SPNFZ. Conversely, US government concurrence in accession by the freely associated states would signal a possible shift in US attitudes toward signing the protocols.

The Federated States is unlikely to initiate the consultations required

under the compact to accede to the SPNFZ Treaty without prearranged agreement from the United States because an American rebuff—which could not be kept quiet—would impair its claim to political independence. The Federated States is even less likely to sign the SPNFZ unilaterally, given the crisis in relations with the United States such a move would provoke. The Federated States would like to use SPNFZ accession to shake off doubts about its independence once and for all. The compact and its subsidiary agreements, however, as voluntarily agreed to, subject the Micronesian signatories to potentially heavy economic penalties for engaging in unilateral foreign policy moves affecting US defense responsibilities.

FSM AND RMI INTERNATIONAL RELATIONS

The Federated States of Micronesia and the Republic of the Marshall Islands developed strong bilateral ties with other nations following the joint declarations in 1986. Australia and New Zealand were among the first to deal with them, albeit cautiously. Australia sent the first foreign diplomat to present his credentials in Kolonia, but termed its representative, the consul-general in Honolulu, a "Minister," rather than an ambassador (NU, 15 July 1987, 1). New Zealand appointed a representative (NU, June–July 1988, 1).

To a degree, both nations followed the US lead. The compact initially provided that the United States and the two states would exchange resident "representatives" rather than ambassadors. The United States, the Federated States, and the Marshalls remedied this confusing terminology in 1989 by amending the compact to change the titles of their diplomatic emissaries to ambassador. The first and last US representatives in Kolonia and Majuro, respectively, were Michael G. Wygant and Samuel B. Thomsen.[2]

Australia and New Zealand eventually accredited ambassadors to the Federated States and the Marshalls, and Australia set up a resident embassy, all prior to the Security Council trusteeship termination. The Australian foreign minister visited both nations in July 1989 and FSM President Haglelgam paid his first state visit to Australia. The determination of the Australian and New Zealand governments to establish cordial relations with the two new Pacific nations impelled both to act sooner rather than later.

The West Europeans, less keenly interested in Pacific Island affairs and, in some instances, opposed to the US failure to seek Security Council approval for its declaration of nonapplicability, deferred opening diplomatic relations but retained a watching brief. For example, the Swiss ambassador to South Korea visited the Federated States of Micronesia in August 1987, the British high commissioner to Kiribati met President Haglelgam in September 1987, the Netherlands ambassador to the Philippines followed suit in April 1989, and the French "deputy Consul General" in Honolulu visited in August 1989 (NU, var). Diplomatic officials of twelve nations and the United Nations attended the dedication, on 3 November 1989, of the new FSM national capital at Palikir, Pohnpei Island (King 1989, 2).

The Federated States and the Marshalls also intensified their participation in multilateral organizations after the compact was implemented. Both were admitted to the South Pacific Forum as full members in 1987 (NU, 15 June 1987, 2); to the International Civil Aviation Organization in 1988 (ICAO 1989, 20); and to the Asian Development Bank in April 1990 (ADB 1990, 12). The Federated States signed the South Pacific Allied Geoscience Commission (SOPAC) constitution in October 1990 (NU, 30 Nov 1990, 6), joining the Marshall Islands as a founding state. All these steps occurred prior to the December 1990 Security Council termination.

The Federated States of Micronesia ratified the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations, as well as two UN drug conventions, again prior to the Security Council action. United Nations bureaucrats were reluctant to accept its ratifications for deposit, however, absent a clear resolution of its status by the Security Council. The United Nations is likely to accept these instruments now that both nations have become members.

Protected States

The foregoing clearly demonstrates that the Federated States of Micronesia and the Republic of the Marshall Islands were treated as sovereign states and assumed a number of the obligations associated with sovereignty prior to the Security Council trusteeship termination. The principal remaining issue is to what extent they can be termed independent. Their publicly proclaimed status as freely associated states does not shed much light on the question. The international personalities of the Cook Islands

and Niue, also nominally associated states, are not nearly as substantial as those of the Micronesian nations. To place all four entities in the same category confuses, rather than clarifies, their status.

James's description of the nineteenth-century status of "protected states"—not to be confused with the more subservient status of "protectorates"—better describes the relationship of the Federated States and the Marshalls to the United States than the term *freely associated states.* According to James,

> a protected state . . . not only is constitutionally independent before it assumes that status—as is indicated by the fact that it becomes a protected state by way of an international treaty; it also persists in that condition thereafter, as the independence of its constitution is unaffected by the treaty of protection. It has not become part of a wider constitutional setup but has just entered into a rather special treaty relationship with another state. From which it may be concluded that it remains a sovereign state—and a fully sovereign one at that, there being no half measures in this sphere. It has voluntarily chosen to restrict the exercise of its sovereign rights in a certain area, allowing another to act on its behalf. But in respect of areas not covered by the treaty of protection it retains its complete freedom of action and, if appropriate, may make treaties on such matters. It may also be open to a protected state to exchange diplomats with other sovereign states, a practice which "historically . . . has been a common occurrence." (James 1986, 100–101)

James cites as examples of prior protected states Tunisia and Morocco vis-à-vis France; Korea vis-à-vis Japan; and Zanzibar, Bahrain, the Trucial States, and Tonga vis-à-vis the United Kingdom.

The Federated States and the Marshall Islands deserve to be considered protected states because they voluntarily accepted certain restrictions on their sovereign powers by entering into the Compact of Free Association with the United States; they retained constitutionally independent governments after compact implementation; they have exercised their latent capacity to exchange diplomats with other nations; and they have been recognized by other nations and international organizations. Admission to the United Nations confirms the international consensus as to their sovereignty.

Protected states are independent as well as sovereign by virtue of the way James defines sovereignty. According to James, sovereignty entails constitutional independence. By qualifying the noun *independence* with

the adjective *constitutional,* James converts an otherwise amorphous concept into a manageable criterion. His insistence that sovereignty is not a bundle of attributes amounts to a rejection of all other criteria. This rejection clears the way for James to conclude that it is possible to determine unequivocally whether an entity is sovereign or not. Ironically, however, James's refusal to acknowledge degrees of sovereignty supports the proposal that there are degrees of independence.

This follows because the achievement of constitutional independence, and consequent admission to the family of sovereign nations, does not free a state of all limitations. No state—not even the most powerful—can be considered totally independent. All sovereign nations are subject to a wide array of restrictions on their ability to act, including both those assumed voluntarily (such as treaties, alliances, and international agreements) and those imposed by external realities (such as aid dependency, balance-of-trade deficits, and hostile neighbors). Conversely, no sovereign state, however constrained, entirely lacks independence. The moiety of independence enjoyed by a sovereign state renders it competent both to enter into diplomatic relations with other states and to sign international agreements. In the case of the Federated States of Micronesia and the Republic of the Marshall Islands, for example, both became competent to sign the Compact of Free Association with the United States once their constitutions entered into force.

Perceptions about whether a polity is constitutionally independent frequently determine whether it will be afforded the opportunity to establish diplomatic ties or to sign international agreements. Even James's presumably clear test can falter when confronted by such borderline entities as the Cook Islands and Niue because international actors may hold varying perceptions of their status. The Cook Islands and Niue have been treated as sovereign in a number of contexts, but could obtain greater recognition by renouncing New Zealand citizenship or rescinding their delegation of authority over external affairs to the government of New Zealand.

Although sovereign since 1979, both Micronesian states extended what Ambassador Pickering termed their "capacity to act independently" by assuming the status of protected states. First, the declarations of nonapplicability ended the chilling effect of the trusteeship upon FSM and RMI diplomatic relations. According to the theory just elaborated, the fledgling FSM and RMI governments could have established relations with other states once their constitutions entered into force in 1979. Such ties never

developed because the United States would have opposed them as encroaching on US responsibilities.

Second, the joint declarations ended the potential for the United States to suspend FSM and RMI legislation. As noted above, before devolving authority to the two governments established under the new constitutions, the US Secretary of the Interior decreed that the laws of each nation would not take effect if suspended by the trust territory high commissioner. The declarations vacated this order.

Finally, the joint declarations implementing the compact inaugurated separate citizenships for residents of the respective portions of the trust territory. There are those who attempt to minimize the importance of this development. McKibben, for example, argues that because the compact bestowed the "essential benefits" of US citizenship on FSM and RMI citizens, the only difference between the Federated States, the Marshall Islands, and the US Commonwealth of the Northern Mariana Islands is the degree of US control over foreign affairs (McKibben 1990, 275). This argument does not hold water. The compact permits FSM and RMI citizens to live and work in the United States, but thereby waives only a handful of the thirty-odd grounds for exclusion under US immigration law. The US government retains, and from time to time has exercised, its authority to prevent FSM or RMI citizens from entering or remaining in the United States, thus drawing a clear line as to the benefits accorded citizens of those jurisdictions. Citizens of both nations are entitled to an array of US government–provided benefits under the compact. Eligibility for such benefits, however, cannot be equated to US citizenship except under the most mercenary interpretation. The establishment of separate citizenships undoubtedly helped convince foreign states and multilateral organizations to accept the two jurisdictions as sovereign.

Conclusions

Those who argue that the Federated States of Micronesia and the Republic of the Marshall Islands will never be sovereign until the mutual security subsidiary agreements are terminated must account for the continually expanding recognition accorded to the two nations since the 1986 declarations. Those who claim the two nations became sovereign only upon the Security Council trusteeship termination in 1990 must explain the successful development of their international personalities prior to termination.

And those who date FSM and RMI sovereignty to the implementation of the compact in 1986 must justify how the compact can have any legitimacy if entered into by nonsovereign entities. The hypothesis that the two nations became sovereign upon the entry into effect of their constitutions, in contrast, provides a rationale for both the legitimacy of the compact and the rapid development of their respective international relations following compact implementation.

Palau (also termed the Republic of Belau)—the sole remaining portion of the Trust Territory—is now in a position analogous to that of the Federated States and the Marshalls prior to the declarations of nonapplicability. It gained a locus of sovereignty by adopting a constitution, but the United States continues to assert the right to suspend laws enacted by the Palauan legislature (USDOI 1979, 28117, superseded by USDOI 1990, 43223). The US government nonetheless is bound by the trusteeship agreement to "promote the development of the inhabitants of the trust territory toward self-government or independence" (UNSC 1947, Article 6). The restrictions on Palau eventually will be lifted, as they were for the Federated States and the Marshalls, whether Palau becomes a protected state or not.

As for the Federated States and the Marshall Islands, the US government may accede to their desire to be termed *independent,* if they acknowledge that such terminology does not affect their obligations under the compact. The status of each as protected states could prove as evanescent as the trusteeship. The annual grants provided to the two nations by the United States under the compact will come to an end in 2001. The compact parties are to begin negotiating whether to extend this assistance beyond its original fifteen-year term on 1 October 1999.[3] Islander expectations for substantial continued aid, however, may be disappointed should no new strategic threats arise in the post-Soviet Pacific. The parties could eventually conclude that the mutual obligations established by the compact are no longer in their respective national interests. If so, these two protected states ultimately may shed their chrysalis to reappear before the international community in less exotic guise.

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tion conference in Melbourne, Australia. The author (a US Foreign Service officer) served at the US Embassy in Kolonia, Pohnpei, Federated States of Micronesia, from 1988 to 1990. The views expressed here are solely those of the author and should not be taken to represent the position of the United States Department of State or the United States Government.

Notes

1 A more recent statement by the government of New Zealand, obtained by the author in early 1992 from the Ministry of External Relations and Trade, further clarifies New Zealand's views on the status of the Cook Islands:

Statement Presented to UNESCO *by the New Zealand Government, October 1989*

The Cook Islands is neither a colony nor a dependent territory. Nor, however, is it a sovereign independent state as that concept is traditionally understood in international law. It falls into a special category of which the Cooks and Niue are perhaps the only members. It is an associated state with full control over its own destiny in matters relating to both domestic and external affairs.

By virtue of its constitution the Cook Islands has full legislative competence over all its affairs. Consequently the constitutional relationship existing between New Zealand and the Cook Islands is best understood by making an analogy with a partnership. The common elements of this partnership are the shared legal personality at international law, the same Head of State and citizenship. As in a partnership each partner has certain responsibilities toward the other partner to ensure the continued existence of the partnership. But each partner can if it wishes withdraw from the partnership at any time.

The constitutional relationship provides for the exercise by New Zealand of certain responsibilities for the defence and external relations of the Cook Islands. However, this does not confer upon the New Zealand Government any rights of control. All legislative and executive powers, whether in these fields or any other, are vested exclusively in the Government of the Cook Islands and the exercise by the New Zealand Government of any responsibilities in foreign affairs or defence must be preceded by full consultation with the Cook Islands. In carrying out these responsibilities the New Zealand Government is in effect acting on the delegated authority of the Cook Islands Government. . . .

It is important to stress not only that the Cook Islands has full constitutional capacity to conduct its own external relations and to enter directly into international arrangements and agreements but that in fact they do directly conduct certain aspects of their external relations. . . .

Capacity at international law has always depended upon "recognition"—that is,

upon willingness of one state to take notice of and deal with another. It is clear that in recent practice many states, particularly those in its own region, have been willing to deal directly with the Cook Islands and accordingly to accept that the Government of the Cook Islands can exercise some of the attributes of sovereignty and engage international responsibility [*sic*] in its own right.

2 For the record, the Department of State determined that Wygant and Thomsen were "of equivalent rank to Ambassadors" while bearing the title of Representative, per US State Department telegram number 343368 (1989).

3 The compact mandates that negotiations to extend provisions of the compact expiring on its fifteenth anniversary, that is, provisions relating to economic assistance (99 Stat, 1813–1814), begin on the thirteenth anniversary (99 Stat, 1818). The "Agreement Between the Government of the United States and the Government of the Federated States of Micronesia Regarding Implementation of the Compact of Free Association" (US 1987a), however, established that the anniversary of the effective date of the compact would fall each year on 1 October. The negotiations on economic assistance therefore are to begin on 1 October 1999.

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NU, *The National Union*
var. FSM Public Information Office. Irregular.
RMI, Republic of the Marshall Islands
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Abstract

International recognition of the Federated States of Micronesia and the Republic of the Marshall Islands as sovereign entities accelerated following the UN Security Council termination of the US-administered UN trusteeship over them in December 1990. However, both states had already established substantial international personalities prior to the Security Council action. The governments of the United States and both nations declared the trusteeship "non-applicable" to both in 1986, concurrently with the entry into effect of the Compact of Free Association. The two nations subsequently established diplomatic ties with such diverse countries as Israel, the People's Republic of China, Australia, and numerous South Pacific neighbors, and joined a variety of international organizations, all prior to the termination. The declarations of nonapplicability were a diplomatic success, not a failure. The two entities gained loci of sovereignty when their

constitutions went into effect in 1979. The newly established constitutional governments exercised their sovereignty in concluding the compact with the United States. By delegating the power of defense to the United States under the compact, the two nations became modern-day "protected states," that is, states that have voluntarily ceded part of their sovereign powers to another nation. As protected states, the Federated States of Micronesia and the Republic of the Marshall Islands can be considered not only sovereign but independent, despite the seeming limitations of the compact and its subsidiary agreements.